No. 633

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IN THE

Supreme Court of the United States

December Term, 1940

MICHAEL PECORARO and SAM GROSS,

Petitioners,

—*against*—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOUIS HALLE,
Attorney for Petitioners,
60 Wall Street,
New York, N. Y.

Law Brief Press

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

A. Summary and Statement of Matter.

An indictment (R. pp. 17-32 inclusive) was filed on October 31st, 1939, charging petitioners, and thirty-nine other defendants, with having conspired to violate Title 26, United States Code, Sections 1320-A, 1322, 1162, 1152-A, 1182, 1184 and 1185, and Title 5, United States Code, Sections 281 to 281-E inclusive and the acts amendatory thereof and the regulations duly promulgated thereunder, and Title 26, United States Code, Section 1162-A and the acts amendatory thereof and the regulations duly promulgated there-

under known as Regulation 17, approved December 23, 1935 and Regulation 92, approved December 28th, 1935.

Forty-one defendants are named in the indictment (R. pp. 31-32). The indictment was severed as to nine of the defendants (R. p. 35), twenty-six pled guilty before or during the trial and the remaining defendants continued through the trial. Seven defendants including the petitioners were found guilty after trial and nine defendants were acquitted (R. pp. 616, 617).

It appears that the theory of the prosecution is that the petitioner, Pecoraro, supplied the sugar and that Franzone, a co-defendant, as to whom the indictment was severed, was working at the still in Belleport "for the interests of" Pecoraro and that Pecoraro carted alcohol from the still (R. pp. 97, 98, 99); that Petitioner, Gross, supplied completely denatured alcohol called "Anti-Freeze" to the distillers, without filing the proper notices pursuant to the regulations (R. p. 209).

On appeal to the Circuit Court of Appeals for the Second Circuit, petitioners asserted that no proof was established to show their participation in the conspiracy. The testimony discloses that petitioner, Pecoraro, had been to the Herth Farm still for the purpose of collecting money (R. p. 98) and that during a period of sixteen days, he had carted alcohol from the still with the supposed aid of Franzone, who was alleged to have stated to Herth, a government witness at whose farm the still was found, that he was there "in the interests of" Pecoraro (R. pp. 97, 98, 99).

The record further discloses that seventeen of the eighteen drums of "Anti-Freeze" originally consigned to Gross, were found at the Herth Farm (R. p. 209) and that no report of the disposition of this product was made, prior to the seizure of the still, to the Alcohol Tax Unit pursuant to the regulations (R. pp. 325, 326, 327). There is further testimony that Gross had on one occasion after the still

at the Herth Farm was seized, appeared there with a party by the name of Rodono. However another government witness named Musso, testified that he could not identify Gross as the person who appeared with Rodono (R. pp. 380, 381, 389, 390, 394, 395, 482, 483). The record also discloses that Gross had made a report to the Police Department concerning the robbery of a truck containing his products (R. pp. 283-290 incl.).

The Circuit Court of Appeals rendered its decision and filed its opinion herein on November 4, 1940, wherein it affirmed the judgment of conviction as to the petitioners and reversed as to one other defendant. The Court, in affirming the judgment of conviction, stated, in substance, that Pecoraro's guilt is substantiated by the fact that the evidence as to him went further than to show that he merely sold sugar because he had, during a period of sixteen days, removed alcohol upon which no tax had been paid; that his participation was further substantiated by the fact that one, Franzone, told Herth, a government witness, that he was working "in the interests of" petitioner, Pecoraro.

Petitioner, Gross' conviction was upheld on the basis that the drums originally consigned to him were found at the Herth Farm, that no report of sale of these drums had been made and had such reports been made by Gross, he would have, in effect, disclosed the illegal enterprise, that his failure to report pursuant to the Regulations, in effect shielded the buyers and from this the Court concluded that his stake in the distiller's venture was more than that of an indifferent seller, and that the Jury might have found from the evidence that Gross knew of the illicit use to which the "Anti-Freeze" was being put.

A petition for rehearing was filed on behalf of the petitioner, Gross, and on November 18th, 1940, the Circuit Court of Appeals for the Second Circuit denied the petition for rehearing.

The record is devoid of any proof to show that Pecoraro took an active part in the conspiracy. He was primarily interested in the return of the moneys due him and was indifferent as to the manner in which he was paid (R. p. 98). The most favorable view of Gross' so-called connection shows him to be nothing more than a vendor of materials to an illicit distiller and of having failed to file a report concerning the disposition of such materials pursuant to the Regulations. However the record does not indicate that Gross knew to what use the "Anti-Freeze" was to be put. The proof discloses that Gross did not know where the still was; that he was taken there by Rodono, a co-defendant, who testified for the Government (R. pp. 380, 381, 389, 390, 394, 395) and as to this there is a dispute since another witness testified that he could not identify Gross as the man who appeared with Rodono (R. pp. 482, 483).

It is respectfully submitted that the ruling in this case is inconsistent with the holding in the case of *U. S.* v. *Falcone,* 109 Fed. 2nd 579, decided by the same Circuit Court, wherein the conviction of the defendants who sold to the distillers was reversed on the ground that it was not shown that the defendants had a stake in the outcome of the venture in spite of the fact that they knew that "others will make an unlawful use" of the illegal product.

In that case the Court said at page 581:

> "It is not enough that he (the vendor) does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of

great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was toto coelo different from joining with them in running the stills. State ex rel. Dooley v. Coleman, 126 Fla. 203, 170 So. 722, 108 A. L. R. 326 accords with this view."

B. Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1935. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

C. Question Presented.

Petitioners herein respectfully assert that the determination of this case by the Circuit Court of Appeals was inconsistent with the determination of what may properly be called an identical case, *U. S.* v. *Falcone,* 109 Fed. (2) 579. In the *Falcone* case, the Court definitely held that the vendor, despite the fact that he knows that others will make an unlawful use of his product, is not a participant in the conspiracy merely by reason of the fact that he sells this product to those persons who intend to put it to an illegal use. That a person, in order to become a participant in a conspiracy, must have a stake in the outcome and must, in a sense, promote the venture. That while morally, the defendant should have refused to sell, legally he could not be joined as a conspirator in the running of the still.

In the instant case, there is no proof that either Pecoraro, or Gross, did anything to promote the venture. Pecoraro is shown to have done nothing more than take alcohol in pay-

ment of a debt due him. He is no different than a purchaser of untaxed paid alcohol. Even if it were conceded that Anti-Freeze found at the still was not stolen from Gross but that he had sold it to the distillers, it can only be said that he is a vendor in the same position as the defendants in the *Falcone* case, *supra*. There is no proof that he ever transported or received any of the alcohol made at the still or that he had a stake or interest in the outcome of the venture.

That by reason of the foregoing the following problems present themselves:

(a) Does the vendor of raw materials to an illicit distiller become a party to the conspiracy by reason of the sale?

(b) Does the failure of a dealer to report a sale pursuant to the regulations without proof as to the knowledge to which the materials sold are being put create the inference that the dealer is participating in a conspiracy to violate the Internal Revenue Laws?

(c) Does an individual by the commission of a substantive offense place himself in the category of a participant to a conspiracy?

D. Reasons for Granting Writ.

The primary reason for the consideration of this petition, is that the decision of the Circuit Court of Appeals in this case, is inconsistent with and contradictory to the decision by the same Court in *United States* v. *Falcone, supra.*

Petitioners also assert that the decision in this case is inconsistent with the decision of the same Court in the *United States* v. *Peoni,* 100 F. (2) 401 (2nd Circuit) and with the determination of the Circuit Court of Appeals in the case of *Copeland* v. *United States,* 90 Fed. 2nd, 78 (5th Circuit),

where, on the basis of circumstances which would have justified a greater degree of suspicion against the defendant, it was held that suspicion of guilt was not an adequate substitute for proof of guilt.

Furthermore, in the case of *United States* v. *Dellaro,* 99 Fed. 2nd, 781 (2nd Circuit), the Court held that a person to become a party to a crime must "affirmatively unite oneself with the venture, or, in the case of conspiracy, must agree to take some part in it", and in the case of *Turcott* v. *United States,* 21 Fed. 2nd 829 (5th Circuit), the Court held that active participation must be established and mere knowledge of illegal acts of others is not sufficient.

In the case at bar, the proof adduced by the respondent, may have shown the commission of some substantive offense, but that is not sufficient to show a participation in the conspiracy.

WHEREFORE, Petitioners pray that a writ of *certiorari* may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein and that the order of the said United States Circuit Court of Appeals affirming the judgment in this case may be reversed and that petitioners may have such other relief as this Court may deem appropriate.

Dated, December 13th, 1940.

MICHAEL PECORARO
SAM GROSS
Petitioners.

By LOUIS HALLE,
Counsel for Petitioners.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

LOUIS HALLE, being duly sworn deposes and says, that he is counsel for the petitioners; that he is familiar with the facts of this case; that he has read a copy of the transcript of record which accompanies this petition; being the transcript of record in the case at bar.

That he has carefully examined the foregoing petition for a writ of certiorari; that the allegations and matters stated in said petition are true to the best of his knowledge, information and belief; and that in his opinion the petition is well founded and the case is one in which the prayer of the petitioners should be granted by this Court.

LOUIS HALLE.

Sworn to before me
this 13th day of December, 1940.

(Seal)

GUSTAVE HALLE
Notary Public, Kings Co. No. 544, Reg. No. 1253,
Cert. filed in N. Y. Co. No. 879, Reg. No. 1H541,
Commission Expires March 30th, 1941.

IN THE

Supreme Court of the United States

MICHAEL PECORARO and SAM GROSS,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below.

The Court below rendered an opinion, a certified copy of which is annexed to the record submitted herewith. The opinion is not as yet officially reported.

Jurisdiction.

The decision affirming the conviction was handed down on November 4th, 1940. The decision denying the petition of Gross for rehearing, was handed down on November 18th, 1940.

The jurisdiction of this Court is invoked under Sections 237 and 240(a) of the Judicial Code as amended by the Act of February 13th, 1935. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7th, 1934.

Statement.

The essential facts have been stated in the petition. The petitioners were convicted of the crime of conspiring to

violate certain provisions of the Internal Revenue Law on the theory that they had associated themselves with the operators of illicit stills by supplying materials used in the operation of the stills. The record fails to disclose sufficient, if any, proof that the petitioners supplied material to the still operators nor does the record show that the petitioners, particularly Gross, knew of the intended illegal use of the materials allegedly sold to the still operators. There is no proof that the petitioners operated the still. Furthermore the decision made in the case at bar is inconsistent with the ruling made in the case of *United States* v. *Falcone,* 109 Fed. 579 (2nd Circuit).

Statutes Involved.

SECTION 88, TITLE 18, U. S. C. A.

CRIMINAL CODE, section 37. Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

POINT I.

The Circuit Court of Appeals for the Second Circuit erred in holding that the respondent offered sufficient proof to connect the petitioners as co-conspirators.

As stated in the petition, it appears that the theory of the Respondent is that the Petitioners' guilt is substantiated by the fact that Petitioner, Pecoraro, supplied sugar to the persons operating the still at the Herth Farm; that he took alcohol in payment of the moneys due him from the illicit

distillers and that one Franzone, a co-defendant named in the indictment but not on trial, was working at the Herth Farm still for the interests of Pecoraro for sixteen days during which period Pecoraro carted alcohol from the still. That, Petitioner Gross is alleged to have sold a completely denatured alcohol called "Anti-Freeze" to the distillers without filing the proper notices pursuant to the Regulations and allegedly appeared at the Herth Farm still after it was seized, ostensibly for the purpose of securing the return of the drums of "Anti-Freeze."

The testimony relating to the Petitioner, Pecoraro indicates that on two occasions he was at the Herth Farm for the purpose of collecting moneys owed to him. There is however nothing to show his interest or participation in the illegal enterprise aside from the declaration allegedly made by Franzone to Herth that he was working at the still in the interest of Pecoraro and that for a period of sixteen days, the Petitioner, Pecoraro removed from the still premises alcohol upon which no tax had been paid.

Counsel contends that the declaration of Franzone as to whose interest he was working is incompetent since it was not made in furtherance of the conspiracy. Furthermore Franzone was not on trial with Pecoraro.

It is conceded that if Pecoraro removed alcohol from the still he may have committed a substantive offense but the commission of such crime is no proof of participation in the conspiracy.

The proof as against the Petitioner, Gross, is of even less weight. It is contended that his part in the conspiracy consisted of supplying seventeen drums of completely denatured alcohol called "Anti-Freeze", without making a report of the disposition. The testimony adduced at the trial indicates that seventeen of the eighteen drums originally consigned to Petitioner, Gross, were found at the Herth Farm still, however the presence of these drums on the still premises is not sufficient to warrant a judgment of conviction. Furthermore

it was disclosed at the trial that Petitioner Gross had reported a robbery to the Police Department of the City of New York on October 22nd, 1938 which was prior to the seizure of the still; and that a report was made to the Alcohol Tax Bureau, after the still was seized, that 18 drums of "Anti-Freeze" were included in the robbery (R. pp. 207, 209, 325, 326, Ex. 16). This letter specifies eighteen drums seventeen of which are identical with the seventeen drums found at the Herth Farm. The testimony as to Gross' presence at the still after it was seized is not conclusive. Rodono, one of Respondent's witnesses testified that he took Gross to the still premises to secure a return of the drums. He also said that he did not know Gross prior to the time that he came to Gross' place of business to invite him to accompany him (Rodono) to the Herth Farm. However, another witness, Musso, testified that he spoke to Rodono when he and another man appeared at the Herth Farm with reference to the drums but he could not identify Gross as the other man.

The mere presence of the drums at the Herth Farm does not create the inference that Gross sold the drums to the distillers inasmuch as Gross had complained of a robbery and it may be that the presence of the drums at the still was not the result of any activity on Gross' part. If we were to assume that there was no robbery and that Gross had sold the drums to the distillers and failed to report the sale such assumption without proof of Petitioner Gross' active participation or interest in the distiller's venture, can not create the inference that he participated in the conspiracy, since it has been held that a vendor of materials to an operator of an illicit still is not *ipso facto* a participant in a conspiracy even if it can be shown that such vendor knowingly made the sale, as was *not* done in this instance.

In the case of *U. S.* v. *Falcone, supra,* the Circuit Court of Appeals for the Second Circuit, held that a vendor is not guilty of conspiracy by virtue of a sale knowingly made. There must, in addition to the making of the sale, be some

proof that the person has some interest in the venture or some stake in its outcome.

The Circuit Court ruled in its opinion in the instant case, that the petitioner, Gross, in effect, "shielded the buyers and actively assisted their project by his failure to report the sales". This statement however is inconsistent with the ruling in *U. S.* v. *Falcone, supra.* In the Falcone case, the Circuit Court reversed the conviction as against those defendants who were shown in some way to have cooperated with the operators of the still. The situation as to Gross is not different. His failure to report the sales, while in itself, if conceded, may be termed a criminal act, yet it is not of such scope as to make him a participant in a conspiracy. There is absolutely no proof that Gross knew to what use the denatured alcohol was being put by the still operators. Furthermore, there is no proof that Gross sold denatured alcohol.

The proof of sale of the "Anti-Freeze", is based on the inference that seventeen of the eighteen drums originally consigned to Gross were found at the Herth Farm still, and that no report of the disposition of these drums had been made. Yet, as against this, is testimony that Gross claimed these drums had been stolen (R. pp. 326, 329). Certainly, the guilt of the Petitioner, Gross, was not proved by the finding of drums, the sale of which is merely inferred.

Even if we were to assume that the petitioners did commit overt acts, the commission of such acts is not sufficient to show that the petitioners are participants in a conspiracy. The law requires more.

It must be shown that there is a common and unlawful design and that the persons knowingly participated in such common and unlawful design. Assuming the petitioners knew that an illegal enterprise was afoot, it cannot be said that on this mere knowledge alone, they are guilty of the conspiracy without proof that they participated in it. See *U. S.* v. *Falcone,* 109 Fed. 2nd 579.

In the cases of *U. S.* v. *Dellaro,* 99 Fed. 2nd 781 (2nd Circuit), *Linde* v. *U. S.,* 13 Fed. 2nd 59 (8th Circuit), *Weinger* v. *U. S.,* 47 Fed. 2nd 692 (9th Circuit), and *Turcott* v. *U. S.,* 21 Fed. 2nd 829 (7th Circuit), it was held that in order to become a party to a crime, the commission of an overt act is not sufficient, but some affirmative act must be proven on the part of the person to be charged showing an agreement to take part in the conspiracy; that mere knowledge of the illegal acts of others is not sufficient.

Furthermore, in the case of *Wilder* v. *U. S.,* 100 Fed. 2nd 177 (10th Circuit), the Court ruled that the mere failure to prevent the conspiracy is not enough to support a conviction upon a charge of violating Section 37 of the Criminal Code, Title 18, U. S. C. A. Section 88, and that it was necessary to prove that a defendant consented in some affirmative way to become a party to the concert of action.

CONCLUSION.

It is respectfully submitted that there is a serious question of law involved in this application in that the question of the consistency of the determination in this case with the determination of a similar case in the same Court below, is presented, as to whether or not a vendor of raw materials is guilty of participating in a conspiracy merely because he knew that there was a conspiracy, after having failed to report the sale of the raw materials pursuant to the Regulations.

For the foregoing reasons, it is submitted that the serious question of law involved in this application is of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

LOUIS HALLE,
Attorney for Petitioners.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 633

MICHAEL PECORARO AND SAM GROSS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 643–645) is reported at 115 F. (2d) 245.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 22, 1940 (R. 648–649), after denial of a petition for rehearing on November 19, 1940 (R. 647–648). The petition for a writ of certiorari was filed December 16, 1940. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was sufficient evidence to support the verdict of the jury finding petitioners guilty of conspiracy to violate the Internal Revenue Laws relating to liquor.

STATUTE INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

An indictment in one count was returned against forty-two defendants, including the petitioners, in the District Court for the Eastern District of New York. This indictment charged the defendants with conspiring to possess and control certain stills set up at points on Long Island, including one at the Herth farm at Bellport, Long Island, and with further conspiring to make and ferment mash and distill alcoholic spirits, and to commit other of-

fenses connected with the illicit manufacture of alcohol, in violation of the Internal Revenue Laws relating to liquor (R. 17–32). Motions to dismiss upon the ground of insufficient evidence were made and denied at the close of the entire case (R. 591–592). Of the defendants, the indictment was severed as to nine, twenty-six pleaded guilty either before or during the trial, and seven, including the petitioners, were found guilty by verdict of the jury (R. 2, 8–13, 616–617). Petitioner Pecoraro was sentenced to imprisonment for sixteen months and petitioner Gross to imprisonment for eighteen months (R. 13, 620). The petitioners and another defendant appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed the judgments of conviction as to both petitioners (R. 643–645, 648–649) and denied their petition for rehearing (R. 648).

The petitioners do not question that there was sufficient evidence to establish the existence of the conspiracy charged. Each asserts, however, that the proof failed to show that he participated in this conspiracy.

Most of the evidence relates to a period beginning in the latter part of May or the early part of June, 1938, when some of the conspirators set up a still in a bungalow on the Herth farm at Bellport, Long Island (R. 39–45), and ending on November 10, 1938, when the still was seized by Federal authorities (R. 51–52, 208–209).

1. The evidence as to petitioner Pecoraro may be summarized as follows:

Otto Herth,[1] who lived on and operated the Herth farm (R. 37–38), testified that one Mimi Franzone,[2] who worked at the still for a period of about sixteen days, informed him that he (Franzone) was working for the interest of Pecoraro (R. 97), to whom the still operators were indebted for sugar (R. 80, 97). Herth overheard a conversation between Franzone and Pecoraro in which Pecoraro stated that they owed him money; that he could not get it by law but that he would get it out of them. Pecoraro then went to the bungalow where he had an argument with Leo Rossello[3] and Little Joe.[4] After this argument he returned and told Franzone or Herth that it was all right; that he was going to get the alcohol. Two loads of alcohol were taken away that same night by Franzone and Pecoraro (R. 98). During the sixteen-day period that Franzone worked at the still truck loads of sugar were constantly arriving and Pecoraro carted away all the alcohol made during that

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[1] Herth was named in the indictment as a conspirator but was not indicted as a defendant (R. 19).

[2] Franzone was one of the defendants as to whom the indictment was severed (R. 8).

[3] Rossello was one of the defendants who pleaded guilty (R. 9, 470).

[4] Little Joe, indicted as Joseph Carlisi, alias Joseph Marks (R. 17) also pleaded guilty (R. 9, 616). The evidence establishes that he was one of the principal conspirators (R. 75–77, 100, 465–469).

period (R. 97–99, 108, 126–127). At one time Pecoraro was introduced to Herth by Big Joe [5] as the new boss (R. 110). Pecoraro told Herth that he had a place in New Jersey from which alcohol was carted away every day; that he generally did not go or drive to such places and sometimes did not even know where the places were located (R. 99–100).

Mrs. Otto Herth testified that Pecoraro was introduced to her by Franzone as Franzone's brother-in-law (R. 188). Franzone told her that Little Joe owed Pecoraro for sugar and that Pecoraro wanted to get alcohol for the sugar. When Mrs. Herth asked Pecoraro where his car was, he told her that he never brought his car to the still premises; that he left it out on the street (R. 189). The next time Pecoraro came to the Herth premises he parked his car in front of the house and he and Mrs. Herth had a further conversation about his securing money or alcohol for the sugar. Pecoraro then carted away some alcohol (R. 189–190, 195–197).

2. The evidence as to petitioner Gross may be summarized as follows:

Otto Herth testified that in October 1938 there were delivered to the still premises on his farm eighteen drums of alcohol. By means of a pump

[5] Big Joe, indicted as Joseph Rodono, alias Joseph Spano (R. 18), pleaded guilty (R. 379). The evidence establishes that he was one of the principal conspirators (R. 107–108, 191, 379–395).

and hose the contents of these drums were pumped into vats at the bungalow containing the still (R. 108). These drums, after being emptied, were still on the premises when the place was raided by the authorities (R. 110) on November 10, 1938 (R. 51). At the time of the raid there were eighteen [6] drums found in the shed next to the still bungalow. These were labeled "denatured alcohol" and "Commercial Solvents." Each drum bore a different serial number (R. 209). These same serial numbered drums, among others, totalling seventy-two drums, each containing fifty-four gallons of alcohol, were shipped by the Commercial Solvent Corporation to Penn-Vis Oil Company in Brooklyn, New York, on October 1, 1938 (Govt. Ex. 16, R. 207–210).[7] Petitioner Gross operated under the name of Penn-Vis Oil Company (Govt. Ex. 39, R. 326–327).

On October 22, 1938, Gross reported to the New York City Police Department that a truck had been stolen from his garage. Gross informed the City detective that the truck, when stolen, contained cans of Penn-Vis motor oil. He did not mention the theft of any drums of alcohol. The detective told Gross that "this is an inside job." On the same day on which the theft was reported

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[6] One witness (R. 209) stated that there were seventeen drums but gave the serial numbers of eighteen drums.

[7] This and other Government exhibits hereinafter referred to are on file with the Clerk of this Court.

the truck was found empty on a city street (R. 283–286).

Joseph Rodono, one of the defendants who pleaded guilty,[8] having heard that Gross had some alcohol drums on the Herth farm, went to Gross two or three days after the raid and told him that the still had been seized and that if Gross wanted his drums back, he would have to go out and get them himself (R. 390, 394–395). Rodono and Gross then went to see one Oscar Musso[9] at Patchogue, Long Island. Either Rodono or Gross asked Musso if he could manage to get these drums away from the Herth farm and Musso said it was impossible because of the seizure (R. 213, 380, 394–395).[10]

Several days later, on November 16, 1938, Gross called the Alcohol Tax Unit in Brooklyn and talked to Investigator Rice. On the following day Rice received from Gross, by messenger, an affidavit, verified by Gross, in the form of a letter to the Alcohol Tax Bureau written on a Penn-Vis Company letterhead (Govt. Ex. 39, R. 325–327), the body of which read as follows:

> On October 21st, 1938, a burglary was committed on our premises consisting of our truck with diverse merchandise, included in

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[8] See footnote 5, *supra*, page 5.

[9] Musso, *alias* Tony Rocca (R. 18), pleaded guilty (R. 479).

[10] While Musso testified that he could not identify the man who came with Rodono as Gross, he admitted that some man came to see him with Rodono (R. 482).

which was some drums containing Ajax-Anti-freeze serial nos., which are as follows:

[Listing 18 serial numbers]

This burglary was reported to the detective bureau on the following morning.

This letter was signed "Sam Gross, Penn-Vis Oil Co."

The eighteen serial numbers listed in the letter are included among the serial numbers of the drums shipped by the Commercial Solvent Corporation to Gross on October 1, 1938 (Govt. Ex. 16, R. 207–210). Seventeen of the numbers referred to in the letter are identical with those found on seventeen of the drums seized on the Herth farm (R. 209). Four of the drums, the serial numbers of which appear both in Gross' letter and on the list of serial numbers representing the drums found at the Herth farm, were reported by Gross to the Alcohol Tax Unit as having been sold by him to a service station in Brooklyn (Govt. Ex. 40, R. 327). Gross explained to Investigator Rice that the sale of these drums had actually been made but that they were returned and were later among those stolen (R. 329).

Alcohol Tax Unit Investigator Daly testified that he served the Penn-Vis Oil Company with a copy of Regulation 92 (R. 399), under which the one served is required to report to the Alcohol Tax Unit the disposition of denatured alcohol (R. 327).

Gross had filed numerous reports with the Unit pursuant to this Regulation (R. 333–335).

Neither petitioner took the stand.

ARGUMENT

The petitioners contend that the decision of the Circuit Court of Appeals holding that there was sufficient evidence to warrant their conviction as conspirators is inconsistent with its prior holding in *United States* v. *Falcone,* 109 F. (2d) 579,[11] wherein it was held that one does not become a conspirator with the distillers merely because he sells them materials, innocent in themselves, even though he knows they are to be put to an illegal use, unless he in some sense promotes the unlawful venture, makes it his own, or has a stake in its outcome. In contending that there is no proof that they participated in the conspiracy, petitioners assert, in substance, that the evidence in the instant case shows at most that they were vendors of raw materials to illicit distillers, knowing the latter to have been engaged in a conspiracy (Pet. 5–6, 11–13, 14).[12]

Although the Circuit Court of Appeals did not specifically refer to its prior decision in the

[11] Affirmed by this Court on December 9, 1940 (No. 42).

[12] While it seems to be asserted that the evidence did not go that far with respect to petitioner Gross (Pet. 4, 12), it is apparent from the summary of the evidence contained at pages 5–9, *supra*, that there is no basis for any more favorable view of the evidence as to him.

Falcone case, it is evident that it was holding in effect that the instant case was distinguishable from that case when, after reviewing the evidence, it said as to petitioner Pecoraro that the evidence "went further than to show that Pecoraro merely sold sugar to the distillers" and as to petitioner Gross that it showed that he took "an active hand in the distillers' business" and had "a stake in their venture in a sense that an indifferent seller has none" (R. 644).

The evidence summarized in the Statement fully supports the conclusion of the Circuit Court of Appeals that petitioners were not mere sellers of raw materials to the distillers but were knowing participants in the conspiracy to operate the illicit still.

Pecoraro's visits to the still premises, his active cooperation with Franzone, who worked at the still and who stated that he was working in the interest of Pecoraro and, most significantly, the fact that throughout the sixteen-day period during which Franzone worked at the still, Pecoraro was allowed to take away all of the alcohol made at the still, are wholly inconsistent, as the court below pointed out, with any view that Pecoraro "had no other connection with the enterprise than to sell sugar to the distillers" (R. 644).

There was clearly sufficient evidence to warrant the jury in finding that Gross was not an indifferent seller but an active participant in the conspiracy. The sale by him to the distillers of over

nine hundred gallons of "antifreeze," his failure to report the disposition of this denatured alcohol, in accordance with the Regulations, his attempt to recover the empty alcohol drums from the still premises after he learned of the raid by the authorities, in order, evidently, to prevent the tracing of the alcohol to him from the serial numbers of the drums, and his false report to the Alcohol Tax Unit that the alcohol had been stolen after he was unable to recapture the drums from the still premises, all lead irresistibly to the conclusion that Gross was more than an indifferent seller of materials to the distillers. His failure to report his sales of the alcohol to the Alcohol Tax Unit obviously shielded the distillers who bought it and actively assisted their unlawful venture. As the Circuit Court of Appeals pointed out, "To report the sales would have stopped the business, both the business of Gross with the distillers, and presumably any operation of the still" (R. 644). Moreover, Gross suppressed disclosure of the sales even though this subjected him to punishment for the commission of a crime (U. S. C. Supp. V, Title 26, Sec. 2811).

In the light of the evidence the Circuit Court of Appeals might well have utilized in the instant case the language which it had employed in *United States* v. *Pandolfi*, 110 F. (2d) 736, 737, certiorari denied, 310 U. S. 651, wherein it said:

> It will be seen that if this evidence proves anything, it demonstrates much more direct

> participation in the conspiracy than was shown in *United States* v. *Falcone, supra.* If the jury were to be permitted to make the deductions and inferences from this proof which would be logical and natural under the circumstances, they would necessarily conclude that these defendants took an active part in carrying the conspiracy forward, and did not limit their activities merely to the legal sale of sugar [and denatured alcohol]. We feel there is no reason why the jury should be denied the opportunity to make such logical and natural inferences.

The other decisions urged by the petitioners to be in conflict with the decision below are distinguishable factually.

CONCLUSION

The decision below was correct, there is no conflict of decisions, and the case is distinguishable from the *Falcone* case. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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